FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

December 13, 2011

Blaine F. Bates Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SCOTT LOGAN GOLLAHER and SHARON WESTERN GOLLAHER, also known as Sharon L. Western, also known as Sharon Lucille Western, Debtors.	BAP No. UT-11-019
SCOTT LOGAN GOLLAHER and SHARON WESTERN GOLLAHER, Appellants, v. UNITED STATES TRUSTEE, FERGUSON ENTERPRISES, INC., VERNON D. SMITH, SALT LAKE COUNTY TREASURER, AURORA BANK, E & C FOX INVESTMENTS, LLC, ERNEST & CHANTAL FOX FAMILY LIMITED PARTNERSHIP, and B&E PROPERTIES LLC, Appellees.	Bankr. No. 10-30065 Chapter 7 OPINION[*]

Appeal from the United States Bankruptcy Court
for the District of Utah

Before BROWN, ROMERO, and SOMERS, Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

In July 2010, Scott Logan Gollaher and Sharon Western Gollaher

[*] This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

("Debtors") filed a Chapter 11 petition, which approximately eight months later, was converted by the bankruptcy court *sua sponte* to a case under Chapter 7. The conversion order was issued after the Debtors failed to obtain approval of their disclosure statement by a date previously established by the court. We are asked to decide whether the bankruptcy court abused its discretion in the case conversion without making the requisite finding under 11 U.S.C. § 1112(b)[1] of which option, conversion or dismissal, is in the best interests of creditors and the estate. We conclude the bankruptcy court's decision should be REMANDED for further findings.

I. Facts

Five months after the Debtors filed their Chapter 11 petition, the bankruptcy court *sua sponte* issued an order directing the Debtors to appear and show cause why their case should not be converted to a Chapter 7 case or dismissed.[2] The bankruptcy court cited several reasons for the show cause order, including, but not limited to: (1) the Debtors' minimal monthly cash flow, (2) the withdrawal of counsel for the Debtors in both the main bankruptcy case and an adversary proceeding filed by a creditor, and (3) the fact no new counsel had since entered an appearance on the Debtors' behalf.[3]

At the show cause hearing, the Debtors advised the bankruptcy court they were challenging the legality of a foreclosure on one of their principal assets (a racetrack), prosecuting actions against various individuals and entities to collect money for their creditors, and talking to prospective attorneys to represent them in the bankruptcy matter. The Debtors assured the bankruptcy court they would

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[1] All future references to "Section" or "§" refer to Title 11 of the United States Code unless otherwise noted.

[2] *Order to Show Cause*, *in* Appellant's Appendix ("App.") at 98.

[3] *Id.*

have a plan ready in 30 days and it would be approved by the creditors in 45 days.[4]

The United States Trustee ("UST") reported the Debtors were current on their financial reports and fee payments, but expressed concern the financial reports did not accurately reflect the Debtors' businesses' operations and requested addendums to them. Upon being asked by the bankruptcy court his position on the conversion/dismissal issue, the UST answered "I believe the case should be converted rather than dismissed, if those are the two options . . ."[5]

If the case were allowed to proceed in Chapter 11, the UST suggested the bankruptcy court impose stringent deadlines on filing and confirming a plan. Thereafter, the bankruptcy court ordered the Debtors to hire counsel experienced in getting a Chapter 11 plan confirmed, to file a disclosure statement and proposed plan by February 15, 2011, to obtain approval of the disclosure statement no later than March 31, 2011, and to have a plan confirmed no later than May 20, 2011.[6] The bankruptcy court specifically warned the Debtors:

> Failing any of those dates or notice by the U.S. Trustee's office that you failed to provide the financial information they've requested will result in conversion of the case without further hearing.[7]

The bankruptcy court issued an order on February 7, 2011, reiterating the deadlines and its warning that the Debtors' case shall be converted to a Chapter 7 if they failed to fully comply with the foregoing requirements.[8]

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[4] *January 25, 2011, Hearing Transcript* ("*Hrg. Tr.*") at 9:21-22, *in* App. at 108 ("If we have this additional time you will see that the plan would be in in 30 days, and in 45 days be approved.").

[5] *Id.* at 14:18-19, *in* App. at 113.

[6] *Id.* at 16:15-25, 17:1-2, *in* App. at 115-16.

[7] *Id.* at 17:3-6, *in* App. at 116.

[8] *Order Pursuant to Order to Show Cause and Establishing Deadlines* ("*February 7, 2011, Order*"), *in* App. at 119-122.

The Debtors timely filed their disclosure statement, which drew objections from the UST and creditor E&C Fox Investments, LLC. Aurora Bank joined the objections. The objectors complained the Debtors' disclosure statement provided insufficient details regarding (1) the past, present, or future operations of the Debtors' commercial assets, (2) the identities of potential refinancers and tenants, and (3) the basis and status of the various lawsuits the Debtors were prosecuting and defending.[9] They also raised concerns regarding classification and treatment of claims, and feasibility.[10]

A hearing on the adequacy of the Debtors' disclosure statement was held on March 30, 2011. At the conclusion of the hearing, the bankruptcy court found the Debtors' disclosure statement inadequate under § 1125(a)(1) and declined to approve the document.[11] The bankruptcy court then announced:

> And based upon the Debtors' failure to obtain approval of a disclosure statement by March 31st and failure to provide the U.S. Trustee with substantial information regarding operations of the business entities, the case is hereby converted to Chapter 7.[12]

On April 7, 2011, the court entered its Order Denying Motion for Approval of the Adequacy of Disclosure Statement and Order Converting Case to Chapter 7.[13] This appeal ensued.

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[9] *See UST's Objection to Debtors' Proposed Disclosure Statement Dated February 15, 2010*, *in* App. at 279-284; *Objection of E&C Fox Investments, LLC to Adequacy of Debtors' Proposed Disclosure Statement*, *in* App. at 285-299; *Joinder in Objections to Disclosure Statement*, *in* App. at 300-302.

[10] *Id.*

[11] *March 30, 2011, Hrg. Tr.* at 27:18-20, *in* App. at 352 ("This disclosure statement does not provide adequate information under Section 1125(a)(1) and will not be approved.").

[12] *Id.* at 27:20-25.

[13] *Order Denying Motion For Approval of the Adequacy of Disclosure Statement and Order Converting Case to Chapter 7*, *in* App. at 355-357.

II. Appellate Jurisdiction and Standard of Review

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[14] The Debtors timely filed their notice of appeal from a final order,[15] and the parties have not elected to have the appeal heard by the United States District Court for the District of Utah. Thus, this Court has jurisdiction over this appeal.

A bankruptcy court's conversion of a case under § 1112(b) is a matter reviewed for abuse of discretion.[16] Likewise, a bankruptcy court's exercise of its equitable powers under §105(a) is reviewed for abuse of discretion.[17]

III. Discussion

Upon determining the Debtors failed to obtain approval of their disclosure statements by an established deadline, and further, failed to provide the UST with substantial information regarding their business operations, the bankruptcy court converted their Chapter 11 case to a case under Chapter 7. The bankruptcy court did not enunciate the statutory basis for the conversion, nor the legal standard employed.

We recognize that a court has the inherent power under § 105(a) to enforce its order. The bankruptcy court repeatedly warned the Debtors their failure to obtain approval of a disclosure statement by March 31st would result in the conversion of their case. The result could have been no surprise to the Debtors.

However, a court may not exercise its broad equitable powers under

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[14] 28 U.S.C. § 158(a), (b); Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a).

[15] *In re Vista Foods U.S.A., Inc.*, 202 B.R. 499, 500 (10th Cir. BAP 1996) (an order converting a Chapter 11 case to a case under Chapter 7 is a final order).

[16] *Hall v. Vance*, 887 F.2d 1041, 1044 (10th Cir. 1989).

[17] *In re Rafter Seven Ranches L.P.*, 414 B.R. 722, 731 (10th Cir. BAP 2009).

§ 105(a) in a manner inconsistent with other, more specific provisions of the Code.[18] Stated differently, a bankruptcy court's exercise of its authority under § 105(a) may not contravene or disregard the plain language of a statute.[19] Herein, § 1112(b) governs conversion or dismissal of a Chapter 11 case. This statute requires the bankruptcy court to make two determinations: (1) cause exists to convert or dismiss, and (2) which option is in the best interests of creditors and the estate.[20]

Federal Rule of Civil Procedure 52(a), made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7052, provides that "[i]n an action tried on the facts without a jury . . . the court must find the facts specially and state its conclusions of law separately."[21] Under Bankruptcy Rules 9014 and 1017(f), Rule 52(a) is applicable in proceedings to convert a Chapter 11 case to a Chapter 7 case.

The purpose of Rule 52(a) is "to aid the appellate court by affording it a clear understanding of the ground or the basis of the decision of the trial court, to make definite what is decided in order to apply the doctrines of estoppel and res judicata to future cases, and to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute."[22] Failure to comply with Rule 52(a) may be cause for remand.[23] Inadequate findings of fact, however, constitute

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[18] *See In re Scrivner*, 535 F.3d 1258, 1263 (10th Cir. 2008).

[19] *Id.*, citing *In re Alderete*, 412 F.3d 1200, 1207 (10th Cir. 2005).

[20] *See In re Nelson*, 343 B.R. 671, 675 (9th Cir. BAP 2006); *In re Superior Siding & Window, Inc.*, 14 F.3d 240, 242-43 (4th Cir. 1994); *In re Helmers*, 361 B.R. 190, 196 (Bankr. D. Kan. 2007).

[21] Fed. R. Civ. P. 52(a)(1).

[22] *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965).

[23] 10 *Collier on Bankruptcy* ¶ 7052.02, at 7052-5 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) ("If the obligation of the trial court under Rule

(continued...)

harmless error if a reviewing court can ascertain from the record that a party was clearly entitled to judgment in its favor, or if there is no danger of confusion about the basis of the decision, the record supports the court's order, and the record indicates the court heard evidence on each element.[24]

Cause to convert or dismiss the Debtors' case is readily ascertainable. The Debtors' failure to comply with the bankruptcy court's February 7, 2011, Order constitutes such cause. In fact, the Debtors do not dispute this aspect of the bankruptcy court's decision. It is the second element of § 1112(b) that creates the problem.

The basis for the bankruptcy court's determination that conversion, rather than dismissal, is in the best interests of creditors and the estate, unfortunately is not readily ascertainable. Factors considered by courts when considering whether dismissal or conversion under § 1112(b) is in the best interest of creditors and the estate include:

> (1) whether some creditors received preferential payments, whether equality of distribution would be better served by conversion rather than dismissal; (2) whether there would be a loss of rights granted in the case if it were dismissed rather than converted; (3) whether the debtor would simply file a further case upon dismissal; (4) the ability of the trustee in a chapter 7 case to reach assets for the benefit of creditors; (5) in assessing the interest of the estate, whether conversion or dismissal of the estate would maximize the estate's value as an economic enterprise; (6) whether any remaining issues would be better resolved outside the bankruptcy forum; (7) whether the estate consists of a "single asset;" (8) whether the debtor had engaged in misconduct and whether creditors are in need of a chapter

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[23] (...continued)
52(a) is not complied with, such as a failure to make findings or the making of incomplete or conclusory findings on material issues, an appellate court will normally remand and vacate the judgment in order for appropriate findings to be made.").

[24] *Atty Gen'l of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 782 (10th Cir. 2009) (internal quotation marks omitted); *In re Blaise*, 219 B.R. 946, 948 (2d Cir. BAP 1998) (where it is possible to determine the bases upon which the court below acted, and the record is clear enough for the appellant to recognize those grounds, the appellant has not been prejudiced and error in the court below's failure to comply with Rule 52(a) is harmless).

> 7 case to protect their interests; (9) whether a plan has been confirmed and whether any property remains in the estate to be administered; and (10) whether the appointment of a trustee is desirable to supervise the estate and address possible environmental and safety concerns.[25]

Courts also consider the preferences expressed by creditors for either dismissal or conversion as they are the best judge of their own best interests.[26]

Although § 1112(b) does not require a bankruptcy court to give exhaustive reasons for the decision to convert or dismiss a case,[27] a reason should be given. Even a reference to best interests may have sufficed.[28] Unfortunately, the decision is devoid of even that reference. We respectfully decline to search the record and analyze the evidence to supply findings which the bankruptcy court failed to make.[29] That is not the function of an appellate court.[30]

IV. Conclusion

The findings and conclusions of the bankruptcy court regarding the best interests of creditors and the estate fail to meet the requirements of and purposes

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[25] *In re Helmers*, 361 B.R. at 196–197 (quoting 7 *Collier on Bankruptcy* ¶ 1112.04[6] (Alan N. Resnick and Henry J. Sommer eds., 15th ed. rev. 2005)).

[26] *In re Camden Ordnance Mfg. Co. of Ark., Inc.*, 245 B.R. 794, 802 (E.D. Pa. 2000) (approving conversion over dismissal, stating "the creditors favored conversion and the creditors are the best judge of their own best interests").

[27] *Hall v. Vance*, 887 F.2d 1041, 1045 (10th Cir. 1989) (quoting *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986)); *In re Mazzocone* 183 B.R. 402, 417-418 (Bankr. E.D. Pa. 1995), *aff'd*, 200 B.R. 568 (E.D. Pa. 1996) (noting considerable authority for the proposition that a bankruptcy court is not required to explain the reasons for dismissal or conversion in detail).

[28] *See In re Fossum*, 764 F.2d 520, 521-22 (8th Cir. 1985) (the bankruptcy court's one line, conclusory statement in support of its decision to dismiss a Chapter 11 case, which "could have been more detailed and more direct," was nonetheless found sufficient).

[29] *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 421-22 (1943).

[30] *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1023 (10th Cir. BAP 1997) ("It is not the function of the appellate court to read the transcript of the evidence in order to determine the essential facts before applying the law of the case.").

behind Rule 52. As a result, the decision in this matter must be REMANDED for further findings.